

(2008) 03 OHC CK 0057
In the Orissa High Court

State of Orissa

APPELLANT

Vs

Mohan Mahanto
 Mohan Mahanto Vs State of Orissa

RESPONDENT

Date of Decision : 05-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 366
Penal Code, 1860 (IPC) — Section 302

Citation : (2008) 1 OLR 942

Hon'ble Judges : L. Mohapatra, J;B.K. Patel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.K. Patel, J.—Both the Death Reference and the Jail Criminal Appeal arise out of the judgment and order passed by the learned Ad hoc Addl. Sessions Judge, Fast Track Court, Rourkela in Sessions Trial No. 143/38 of 2006 convicting the appellant for commission of offence u/s 302 I.P.C. and sentencing him to death and also to pay fine of Rs. 5000/-. No default sentence has been passed for non-payment of fine amount.

2. Accusation in the case relates to commission of gruesome murder by the appellant of his wife Muni Mahanto and son Babu, who was aged about one year in the night of 12/13 January, 2006. P.W.1 is the deceased's brother whereas the informant, P.W.4 is the appellant's neighbour. Prosecution case is that the appellant was residing with his deceased wife and son as a tenant in the house belonging to P.W.9 at Bisra. There was frequent quarrel between the appellant and the deceased wife. The appellant was present in his house with the deceased persons and some sounds were heard from the house of appellant in the night of occurrence. In the morning of 13.1.2006, P.W.4 and others found the door of the appellant's house was lying open and the dead bodies of the deceased persons, Muni and Babu lying inside the house with cut injury on the neck of the deceased Muni and a handkerchief tied around deceased Babu's neck. One iron paniki (M.O.I) stained with blood and a lathi (M.O.II) were lying nearby. The appellant

was found absent. The informant P.W.4 lodged an F.I.R., Ext. 4 at Bisra P.S., on the basis of which P.W.10, the Inspector-in-charge, Bisra Police Station registered the case and took up investigation. In course of investigation, P.W.10, inter alia, held inquest over the dead body, effected seizures of M.O.I, and M.O. II and got the dead bodies subjected to post-mortem examination by P.W.7 Dr. Khan at Bisra C.H.C. In spite of search, the appellant was found to be absconding till 30.7.2006 when he was apprehended in his native village Teterkella. Prosecution asserts that the appellant made extra judicial confession to have killed his wife and son before P.W.9. On completion of investigation, Charge-sheet was submitted against the appellant.

3. The appellant pleaded denial to the charge. In his examination u/s 313 Cr.P.C, the appellant took a specific plea that he left for Punjab on 20.12.2005.

4. Prosecution examined ten witnesses apart from relying upon the documentary evidence marked Exts. 1 to 13 as well as material objects, M.Os. I and II. As stated above, the informant P.W.4 and the appellant's land lord P.W.9 are the two material witnesses. P.W.1 is deceased Muni's brother. P.W.2 is a witness to the inquest and seizure. P.W.3 scribed the F.I.R. Ext.4. P.W.5 is a constable and P.Ws. 6 and 8 are witnesses to seizure. P.W.7 is the Medical Officer of Bisra C.H.C. who conducted post-mortem examination over the dead bodies of the deceased persons. P.W.10 is the Investigating Officer. No defence evidence was adduced.

5. In assailing the impugned judgment and order, it was contended by the learned Counsel for the appellant that in the absence of any eye witness to the alleged commission of murder, none of the circumstances relied upon by the prosecution to prove the charge against the appellant has been established. It was submitted that the learned trial Court itself has not accepted the evidence relating to extra judicial confession to have been made by the appellant before P.W.9. It was contended that neither the evidence of P.W.4 nor that of P.W.9 regarding presence of the appellant on the date of occurrence is acceptable and, therefore, the circumstance of the appellant not found by the police till 30.7.2006 is no way incriminating in establishing the charge against the appellant.

6. Learned Counsel appearing for the State submitted that learned trial Court has rightly relied upon the evidence of P.Ws. 4 and 9 to conclude that the appellant was last seen in the company of the deceased persons in the night of occurrence and the appellant absconded thereafter till apprehended on 30.7.2006.

7. Undoubtedly both the deceased persons met with homicidal death. Medical evidence on this score is unimpeachable. P.W.7 upon conducting post-mortem examination over the dead body of the deceased Muni found incised wound on her neck. The larynx had been incised at hyoid bone level. Injury was ante-mortem and the cause of death was haemorrhage and shock resulting from the ante-mortem injury caused by sharp cutting weapon. There was ligature mark

completely encircling the neck of the deceased Babu below the hyoid cartilage. Ecchymosis was present under the ligature mark. A handkerchief was found tied on the neck. The cause of death of the deceased Babu was asphyxia due to ante-mortem strangulation.

8. Admittedly, there is no eye witness to the occurrence. As has been pointed out by the learned trial Court, in order to establish that it was the appellant who committed murder of his wife and son; the prosecution relied upon the following circumstances:

(a) On the night of occurrence the accused was last seen with the deceased persons at his house;

(b) Immediately after the occurrence the accused absconded and he was apprehended almost six months after the occurrence from his native place;

(c) The accused made extra judicial confession before the house owner (P.W.9) in whose house accused was residing with the deceased persons at the time of incident;

(d) False explanation rendered by the accused for his absence in the village immediately after the occurrence;

(e) Conduct of the accused in remaining silent after the occurrence and no attempt was made by him for a long period, even if, his wife and minor son met homicidal death.

9. So far as the circumstance No. (c) relating to extra judicial confession made by the appellant before P.W.9 is concerned, the evidence of P.W.9 does not stand the test of legal scrutiny so as to be found acceptable in a criminal trial. P.W.9 at para-3 of the deposition stated that about three months after the occurrence, the accused came near him and told that due to mistake, he has killed the deceased persons and thereafter left the place by a train. In course of cross-examination, at para-6 of the deposition, P.W.9 stated that on the next day morning of the day occurrence the accused told him that he has killed his wife and son. Again at para-7 of the deposition P.W.9 stated that three months after the occurrence when the appellant came near him, he had not told him that he had killed his wife and son. The learned trial Court has observed after recording para-6 of P.W.9's deposition that when the defence counsel put a question to P.W. 9 as to whether the appellant was arrested by the police when he made confession before P.W.9, P.W.9 told that on the next day of occurrence, the appellant told him that he has killed his wife and son. Thus, the evidence available from the deposition of P.W.9 regarding extra judicial confession stated to have been made by the appellant is not found to be trustworthy and acceptable. The evidence of P.W. 9 on this score is far from being consistent.

10. However, the learned trial Court appears to have observed in the impugned judgment and order that even if the evidence with regard to extra judicial confession is not relied upon, the other circumstances placed on record clearly

suggest that the appellant was the author of the crime of murder of his wife and son.

11. Learned Counsel for the appellant strenuously argued that not only none of the other circumstances has been established but also the so called circumstances do not constitute a complete chain to form the basis of conviction in a criminal trial. In a case based on circumstantial evidence, not only each of the incriminating circumstance is required to be established beyond reasonable doubt, but also the circumstances so established are required to constitute links in a chain of circumstance from which the only inference which can be drawn is that it was the appellant who committed the offence. Legal proof of the alleged offence does not allow the room for any missing link.

12. So far as the other circumstances (a), (b), (d) and (e) are concerned, those are substantially interrelated. Unless it is established that the appellant was last seen with the deceased persons prior to the occurrence, there is no scope to allege that after the occurrence he absconded or that he rendered false explanation for his absence or that the appellant remained silent for a long period, even though his wife and minor son had been killed. Admittedly, the appellant could not be apprehended by police for about six months after the occurrence as he was not found. P.W.4 is the only witness to have deposed that the appellant was present in the house in which the occurrence took place on the date of occurrence. In his examination-in-chief, P.W.4 simply states that the appellant was residing with his deceased wife and son in the occurrence house. However, on being asked by the trial Court as to whether the appellant was present in his house on the date of occurrence, P.W.4 states that on the day of occurrence, he saw the appellant in the house where the occurrence took place. However, it is on record that P.W.4 had omitted to make such assertion in the police statement made during investigation. It has been elicited in the cross-examination from P.W.10 that P.W.4 had not stated before him that on the date of occurrence, he had seen the appellant in his house where the occurrence took place. Also P.W. 4 makes prevaricating statement regarding the presence of the appellant in the occurrence village or in the occurrence house, when he says in para-10 of his evidence that he saw the appellant in his house at about 3.00 P.M. sitting at the verandah by taking liquor. Again he says in the next sentence that he saw the appellant sleeping at Durga Mandap adjacent to his house by taking liquor. Such inconsistent, contradictory and prevaricating evidence available from the mouth of P.W.4 does not at all constitute a firm basis to sustain the finding that the appellant was in his house or in the occurrence village on the date of occurrence. Therefore, there is also no basis to infer that the appellant absconded after the occurrence.

13. In view of the above, there is no acceptable evidence on record to conclude that the deceased persons were last seen in the company of the appellant. Logical corollary to the absence of evidence with regard to the presence of the appellant in the occurrence village on the date of occurrence would be that it

cannot be said that the appellant absconded till he was apprehended in his native village. Even if the appellant's absence is held to be an act of absconding, such conduct by itself is not conclusive either of the guilt or of a guilty conscience. In the case of Smt. Santosh Kumari and Ors. v. State reported in AIR 1972 SC 110, it has been held:

It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of the guilt or of a guilty conscience. For a person may abscond on account of fear of being involved in the offence or for any other allied reason.

14. Reliance was placed by the learned trial Court on the decision of Jalalsab Shaikh v. State of Goa reported in 17 (1999) CCR 442 wherein as many as eight circumstances including the circumstance of absconding were held to have been established but it was held that false explanation given by the appellant regarding the manner in which his wife was killed provided the missing link in the chain of circumstance. In the present case, having already held that the circumstance of last seen together and absconding are not established, we observe that there is no basis from which an inference may be drawn that the appellant's assertion to have gone to Punjab can be constructed as a false explanation. Therefore, not only there is no evidence to establish circumstance Nos. (a), (b) and (c) but also circumstance Nos. (d) and (e) referred to by the learned trial Court under the facts and circumstances of the case do not incriminate the appellant.

15. In view of the above discussion, the appellant is entitled to be acquitted. Accordingly, the appeal is allowed and the impugned judgment and order of conviction and sentence passed by the learned Ad hoc Addl. Sessions Judge, Fast Track Court, Rourkela in Sessions Trial No. 143/38 of 2006 against the appellant u/s 302 I.P.C. are set aside. It is stated that the appellant is in custody. If that be so, the appellant Mohan Mahanto be set at liberty forthwith, unless his detention is otherwise required. The death reference made u/s 366 Cr.P.C. is answered accordingly.

L. Mohapatra, J.

16. I agree.